

MEASURES TO DETER AND ADDRESS SEXUAL HARASSMENT: PROPOSALS FOR CHANGE

BYSTANDER RESPONSIBILITIES

The responsibility of dealing with sexual harassment and reporting should not rest with victims. Instead, the onus should be on perpetrators to stop their behaviour. Further, workplaces must take positive steps to identify and address sexual harassment and bullying. The necessary cultural change must start at the top, and those in positions of power in the profession in particular, must call out inappropriate conduct when they see or hear it.

Placing responsibility on everyone to be active bystanders is a recognition that the consequent obligations of cultural change lie on all of us. Sexual harassment is a structural and cultural issue. Reliance on individuals making complaints has failed to reduce levels of its occurrence. In the legal profession, nearly 50% of women have reported experiencing sexual harassment (IBA Report #UsToo 2019) and there is no culture of persons being 'active bystanders'. As such there needs to be substantial preparatory work undertaken to gauge the existing behaviours and attitudes and to engage legal practitioners and those working in the legal profession about the benefits of cultural change. There needs to be endorsement by the entire legal profession of bystander provisions and support for workplaces, Law Societies and Bar Associations to commence the process of educating and implementing bystander provisions into their workplace policies.

Once there is a receptive environment and people understand the implications of being an active bystander, the following is an example of a policy on bystanders:

We expect everyone to support colleagues who may have been subjected to unacceptable behaviour. A 'bystander' is a person who has witnessed or subsequently learned about potentially unacceptable behaviour at a firm. A bystander can be a partner, manager, colleague or subordinate of the person who may be subjected to unacceptable behaviour.

Reliance on bystanders is a vital part of our strategy to prevent unacceptable behaviour. This is because sometimes people affected by this behaviour might not know the behaviour is unacceptable or may feel uncomfortable about coming forward or speaking up. Research shows that this can particularly be the case where:

- *the person is new to an organisation;*
- *the conduct is engaged in by someone who is a superior to the person; or*
- *the person feels vulnerable in their role eg. because of their age or gender.*

Principal Sponsor:



We expect bystanders to provide support to colleagues who may have been subjected to unacceptable behaviour, including by:

- *‘calling’ unacceptable behaviour when it’s seen in the workplace;*
- *spotting offending behaviour and asking the colleague if they are OK;*
- *supporting the colleague by providing them with information about this policy and avenues for raising their concerns; or*
- *reporting the conduct to a manager, equal opportunity contact officer, or member of human resources.*

Unacceptable behaviour means discrimination, sexual harassment, bullying and victimisation.

To the extent possible we will take steps to preserve a bystander’s anonymity. In addition, bystanders are protected by the victimisation provisions of this policy. Bystanders who need support are encouraged to contact a Contact Officer. For more information refer to the ‘Workplace Behaviour Complaint Policy’ section of this policy below.

Speaking up is not always easy, but we all have a personal responsibility to adhere to, and ensure others adhere to, this policy to ensure that we provide a safe and inclusive place to work.

We support bystanders and will not tolerate retaliation against a bystander who intervenes to assist someone who may have been subjected to unacceptable behaviour.

VICTIM FOCUSED COMPLAINT AND INVESTIGATION PROCESSES

Workplace policies and procedures with regards to workers making complaints should be victim-focused; that is, focused on minimising harm to workers. This involves a fundamental re-orientation of our practices, as the current focus most often starts with the premise that sexual harassment is a reputational risk which must be kept secret. Sexual harassment as defined in the anti-discrimination legislation is not a criminal offence and there is no requirement to approach the complaint with an assumption that the accused is innocent.

It is important to recognise that there is chronic under-reporting of sexual harassment because reporting is so onerous and burdensome on the person making the complaint.

Victim-focused policies provide for the victim’s wishes, prioritise safety and wellbeing, and shape any actions with the victim’s wishes in mind. These policies should:¹

- Give control to the victim to make or not to make a complaint at her/his own time and in an appropriate manner;
- Provide for the consultation with the victim as to who conducts the investigation and the manner in which the investigation is to be conducted;
- Provide clarification of privacy and confidentiality issues so that the person is aware of how their complaints will be dealt with;
- Enable the asking of questions, listen without judgement and show empathy;
- Commit to keeping the person informed throughout the process and before any action is taken;
- Ensure the wellbeing, protection and safety of the person, including understanding the trauma that person may have experienced and how and when symptoms of that trauma may present;
- Ensure timeliness in communications and investigations, if conducted;

- Ensure equal treatment of the person and the alleged harasser in any process, including access to support and information about rights of appeal and external rights to complain;
- Offer the person a range of administrative adjustments if requested, such as temporary working from home or in another location away from the alleged harasser;
- Ensure that there is a review of policy and procedure following each complaint and seek feedback from the persons involved in the process;
- Annual auditing; and
- Establishing a system of Safety Contacts (trained staff who are prepared to be a first point of contact for colleagues).

REPORTING

1. Recording and reporting of de-identified complaints of sexual harassment and discrimination to the Office of Legal Services on an annual basis by law firms, the Law Society of NSW and the NSW Bar Association.
2. Law firms and employers to report to the Board as to discrimination and sexual harassment allegations.
3. Non-Disclosure Agreements to be implemented only if requested by the complainant.
4. Adoption of protocol in similar terms to the one drawn up by the Victorian Bar and the Supreme Court of Victoria for handling sexual harassment complaints.
<https://www.vicbar.com.au/sites/default/files/Protocol%20between%20Bar%20and%20Chief%20Justice.pdf>

BETTER LEGAL EDUCATION

1. Compulsory face-to-face Continuing Professional Development (CPD) on appropriate conduct once every year.
2. For renewal of practicing certificates, barristers confirm that they are aware of their obligations under the Rules to not sexually harass or discriminate while performing barrister work.
3. Include outline of obligations including bystander training overview in such courses as the Legal Practice Management Course and Bar Practice Course.
4. Include outline of obligations including bystander training overview in mentoring programs offered by the Law Society and Bar Association.

LAW REFORM

1. Establishment of a National Judicial Commission.
2. Code of Conduct for those appointed to courts and tribunals, Registrars and Commissioners.
3. Amendments to the Commonwealth and State anti-discrimination laws to introduce positive workplace obligations as to the prevention of sexual harassment.

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ⁱ A number of the points are drawn from the Respect@Work Report 2020 Australian Human Rights Commission pp679–80.